

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	8:04CR164-7
)	
Plaintiff,)	MEMORANDUM
v.)	AND ORDER
)	
PEDRO MORALES,)	
)	
Defendant.)	

This matter is before the court on the defendant’s “motion for leave to proceed on appeal in forma pauperis” (filing [387](#)), which will be treated as a notice of appeal from the court’s judgment of September 26, 2011 (filing [384](#)), which dismissed with prejudice the defendant’s motion to vacate, set aside, or correct his sentence pursuant to [28 U.S.C. § 2255](#) (filing [382](#)).

Before the defendant’s appeal can proceed, a certificate of appealability must issue. *See Fed. R. App. P. 22(b)*. A certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” [28 U.S.C. § 2253\(c\)\(2\)](#). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 motion, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong” in order to meet the standard contained in § 2253(c). [Slack v. McDaniel, 529 U.S. 473, 484 \(2000\)](#). In contrast, when a district court denies a § 2255 motion on procedural grounds without reaching the applicant’s underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when “the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

For the reasons set forth in the court's memorandum and order entered on September 26, 2011 (filing [383](#)), as modified on October 21, 2011 (filing [386](#)),¹ the court concludes that the defendant has not made a substantial showing of the denial of a constitutional right as required by [28 U.S.C. § 2253\(c\)](#). Therefore, a certificate of appealability will not be issued.

The defendant was determined to be financially unable to obtain an adequate defense in his criminal case, and an attorney was appointed to represent him at trial. Because the appeal appears to be taken in good faith, even though a certificate of appealability will not be issued, the defendant may proceed in forma pauperis on appeal pursuant to [Federal Rule of Appellate Procedure 24\(a\)\(3\)](#).

IT IS ORDERED that:

1. The defendant's motion for leave to proceed in forma pauperis on appeal (filing [387](#)) is granted.
2. A certificate of appealability will not issue in this case.
3. The clerk of the court shall transmit a copy of this memorandum and order to the United States Court of Appeals for the Eighth Circuit.

November 14, 2011.

BY THE COURT:

Richard G. Kopf
United States District Judge

¹ In the September 26, 2011 memorandum and order, I denied the defendant's § 2255 motion because (1) it was untimely and (2) his claim of ineffective assistance of counsel has no merit. The defendant filed a motion for reconsideration which I granted in part on October 21, 2011, finding that the § 2255 motion was timely filed under the prison mailbox rule. In all other respects, the motion for reconsideration was denied.